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IN THE

Supreme Court of the United States

October Term, 1961

No. 820

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER,

Petitioner,

vs.

CONTINENTAL AIR LINES, INC. and THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

SAMUEL J. COHEN,
Attorney for Respondent Air Line Pilots Association, International,
50 East 42nd Street,
New York, New York.

Of Counsel:
HENRY WEISS,
BENJAMIN M. SHIEBER.

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Opinion Below

The opinion of the Court of Appeals is not yet officially reported. It is unofficially reported at 49 LRRM 2951.

Question Presented

Did the Court of Appeals err in dismissing an appeal from a denial of a preliminary injunction and directing dismissal of the action on grounds of mootness where before the appeal was heard

(a) an unincorporated association that was the sole plaintiff and appellant dissolved itself by action of its members pursuant to its Constitution and by-laws and directed its attorneys to discontinue litigation initiated in its name;

(b) the dispute involved in the action had been settled, and

(c) the sole plaintiff and appellant represented no employees of the carrier and the former employees that it claimed to represent had, on the advice of counsel for Petitioner, accepted termination pay which they never offered to repay and were estopped to claim a right of employment?

Statement

Respondent, Air Line Pilots Association, International, ("ALPA") is a labor organization that represents flight deck crew members in the service of all scheduled airlines in the United States including respondent, Continental Air Lines, Inc. ("Continental").

This action was brought by an unincorporated association, the Continental Airlines (CAL) Chapter of the Flight Engineers' International Association, AFL-CIO, hereinafter referred to as "CAL Chapter". Petitioner does not challenge the fact that CAL Chapter, the sole plaintiff and appellant in this action, was dissolved in accordance with proper procedure under the applicable Union by-laws and that no effective trusteeship over that chapter was established (see Pet. 6, note 7). The dissolution of the CAL Chapter took place while its appeal from an order of the District Court denying its motion for a preliminary injunction was pending.

The complaint in this action, printed at pages 3 to 15 of the Transcript of Record,* prayed for a declaratory

* Page numbers in the printed Transcript of Record will hereinafter be referred to by letter "R" followed by page number(s) in parentheses.

judgment that a collective bargaining agreement between defendants Continental Air Lines, Inc., herein referred to as "Continental" and the Air Line Pilots Association, International, AFL-CIO, herein called "ALPA", was invalid in certain respects as violative of the Railway Labor Act. The complaint also sought injunctive relief to prevent Continental and ALPA from engaging in conduct to implement this agreement. The District Court denied plaintiff's motion for a preliminary injunction on the grounds that the contentions made by plaintiff had been decided adversely to it in a prior proceeding which barred plaintiff from relitigating those issues in this case (R. 299-305).

Plaintiff appealed from the order denying it a preliminary injunction, and the correctness of that order was the only question before the Court of Appeals when it held the appeal and the action moot because: "(1) CAL Chapter, the sole plaintiff and appellant, is no longer in existence; (2) the dispute involved in the lawsuit has been settled; and (3) CAL Chapter represents no present employees of Continental and any former employees whom it purports to represent have accepted termination pay and are now estopped to claim a right of employment" (Pet. 23, 30).

As has been shown, petitioner does not challenge the dissolution of the sole plaintiff in this action and the invalidity of the trusteeship that the Flight Engineers' International Association, AFL-CIO, attempted to establish over CAL Chapter. These were part of the basis for the decision of the Court below that the appeal and the action by CAL Chapter were moot. Instead, petitioner argues that even if the sole plaintiff herein was dissolved the Court of Appeals erred because dissolution of CAL Chapter was an act pursuant to an alleged conspiracy by Continental and ALPA to establish by an agreement between them dated May 29, 1959 terms and conditions of employment of employees represented by CAL Chapter and to eliminate CAL Chapter as representative of the flight engineers

employed by Continental; and, further, that the dissolution of CAL Chapter was brought about by individual negotiations between the carrier and the members of that chapter.

Petitioner's concession that dissolution of CAL Chapter was properly carried out and that no valid trusteeship had been established over CAL Chapter has the effect of emphasizing the correctness of the decision below that there exists at present no party plaintiff in this action. If there are acts of Continental and ALPA that can be the subject of a complaint, CAL Chapter cannot complain of them since it is not in existence.

But turning to the allegations made in the Petition for Certiorari, it is apparent from the opinion of the Court of Appeals and the record on the motions to dismiss the appeal that was before that Court that there were no individual negotiations between the carrier and members of the former CAL Chapter. A majority of the members of that chapter authorized ALPA to represent them, and it did represent them in arriving at an agreement settling an existing strike which secured for 15 strikers a return to work as members of the flight deck crew on jet aircraft and for the remaining 7 strikers, on the advice of Messrs. Gromfine and Hackler, attorneys for petitioner, $10,000 termination pay which they have never offered to repay. See page 7 of the affidavit of Glenn B. Iverson, attached to the "Opposition Of Appellant To Motions Of Appellees To Dismiss Appeal."

As for the allegations of a conspiracy between Continental and ALPA, the record contains ample proof that no such conspiracy ever existed. At the time that this action was commenced, ALPA was the duly recognized representative of the pilots employed by Continental, while CAL Chapter had been recognized by that carrier as the collective bargaining representative of its flight engineers. There had been no determination by the National Media-

tion Board with respect to the craft or class of flight deck crew members employed by Continental. *Cf., In re Representation of Employees of United Air Lines, Inc.—Flight Deck Crew Members*, 3 NMB Determinations of Craft or Class 56 (1961); *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 908 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 956 (1962).

The factual situation underlying this action springs essentially from the introduction of Boeing 707 turbojet equipment into scheduled service by Continental on June 8, 1959 (R. 95). Prior to that date, the four-engine piston driven aircraft operated by Continental carried a flight deck crew consisting of two pilots represented by ALPA, and a flight engineer represented by CAL Chapter. The flight deck crew on all other types of equipment operated by Continental (twin-engine piston driven and four-engine turboprop) consisted solely of pilots represented by ALPA.

With the introduction of the newer and faster turbojet equipment, it was generally recognized in the industry that the safe operation of such aircraft required additional piloting assistance in the cockpit and maximum crew coordination with full cross-qualification of all crew members, an approach which had theretofore been adopted with respect to piston equipment by some carriers but not by others (R. 177-179). Accordingly, ALPA sought to provide, through collective bargaining with the carriers, for a crew of three pilot-qualified personnel for the operation of jet aircraft (R. 179). On the carriers which had been operating piston equipment with a crew consisting of three pilot-qualified persons, the onset of the turbojet presented no problem of crew complement. For those carriers, on the other hand, who had been operating piston equipment with two pilots and a flight engineer not required to be pilot-qualified, the transition to a properly qualified crew of turbojets presented some difficulties.

For the latter group of carriers, in which Continental was included, two alternative methods of achieving a basically qualified crew were presented. The flight engineer under this agreement might become pilot qualified, and the jet operation could then be conducted with a three-man crew. This was the approach endorsed by ALPA (R. 179-180). Or, as some of the carriers later proposed, a third pilot could be added to the piston aircraft crew resulting in a crew on jet equipment of four men—three pilots and a flight engineer who need not be pilot qualified (R. 179).

It was first demonstrated on Eastern Air Lines, one of the carriers which had been operating piston aircraft with a flight engineer not required to be pilot qualified, that this choice of alternatives was not to be a simple one. In 1957, anticipating the introduction into service by Eastern of the Douglas DC-8 airplane, ALPA bargained for a fully pilot qualified three man crew. The Eastern Air Lines Chapter of the Flight Engineers International Association, on the other hand, resisted the qualification of its flight engineers as pilots, and instead contended for a separation of the training and duties of the flight deck crew members (R. 180).

Negotiation was followed by mediation, and a strike on Eastern over this crew complement question seemed imminent. The President of the United States, however, acting under Section 10 of the Railway Labor Act to avert the strike, appointed a Presidential Emergency Board, which after many months of hearings, thousands of pages of testimony, and hundreds of exhibits, recommended that the safe operation of turbojet aircraft required that all crew members be pilot qualified (R. 181-187). Eastern and ALPA accepted the recommendations of the Board, which had been submitted to the President and were approved by him. The Board's recommendations were, however, rejected by the FEIA (R. 186).

ALPA and Eastern thereupon resumed negotiations on the issue of crew complement. An agreement was concluded between them on November 12, 1958 (R. 188). A copy of this agreement was annexed to the affidavit of Clarence N. Sayen below as Exhibit 5. This agreement was executed prior to any agreement between Eastern and the FEIA. It provides for three pilot qualified crew members on jet aircraft, and in this respect is identical to Section 26(h)(1) of the Agreement between Continental and ALPA which is being challenged herein (R. 188).

Eastern and the FEIA were still unable to agree upon the crew complement of Eastern's turbojets. Eastern wished to operate these aircraft with a crew of three, all of whom were pilot qualified. Eastern had proposed that the flight engineer be pilot qualified and be the third crew member. The FEIA, however, insisted upon the retention in the jet cockpit of the non-pilot-qualified flight engineer. A stalemate, followed by an engineers' strike of 39 days, ensued. Finally, Eastern acceded to the FEIA by providing a position for the non-pilot-qualified flight engineer on its jet aircraft (R. 193-194).

Thus, it is obvious that nothing in the ALPA-Eastern agreement of November 12, 1958, prevented the FEIA from placing a flight engineer on the company's jet equipment. By the same token, nothing in the Continental-ALPA agreement of May 29, 1959, calling for three pilot-qualified persons on jet equipment, prevented CAL Chapter, by negotiation, strike or any other appropriate method, from assuring the presence of a fourth man on Continental's jet equipment (R. 194). Prior to the agreement of May 29, 1959, which is challenged in this action, ALPA had entered into similar agreements with American Airlines, Pan American World Airways, United Air Lines and Trans-World Airlines (R. 195-199). In each of these cases with the exception of United, where the flight engineers accepted pilot qualification as a condi-

tion of service on the jet, the agreement between ALPA and the carrier providing for three pilot-qualified crewmen on jet equipment was in no way inconsistent with the agreement between the FEIA and the carrier placing a flight engineer on the jet (R. 198-199). On each of these carriers the FEIA successfully negotiated a position for a non-pilot qualified flight engineer on jet equipment, an agreement between the carrier and ALPA, comparable to that challenged herein, being present.

On September 5, 1958, Continental publicly announced that it intended to adopt and implement the recommendations of the Eastern Air Lines Presidential Emergency Board with respect to the jet equipment which was to be delivered nine months thereafter (R. 81-82; Exhibit 1 to affidavit of B. J. Anderson below). At the time of this announcement, the collective bargaining agreement in effect between Continental and CAL Chapter contained a "scope" clause, which guaranteed a place for the flight engineer on all aircraft subsequently acquired by Continental. Extensive negotiations followed, in which Continental bargained for the deletion of the "scope" clause from the agreement and CAL Chapter urged the extension of that clause so as to require an employee covered by its agreement with Continental to be a member of the crew of any aircraft carrying a crew of more than two persons. CAL Chapter and Continental agreed that this "scope" clause be omitted from the new contract concluded by Continental and CAL Chapter less than two months later, on October 31, 1958 (R. 82, 95).

It is appropriate now to discuss the circumstances which led to the Continental-ALPA agreement of May 29, 1959, the agreement which CAL Chapter contended was invalid. In November, 1958, ALPA, in accordance with Section 6 of the Railway Labor Act, served a notice of proposed changes in the collective bargaining agreement upon Continental (R. 82). A copy of these pro-

posed changes is annexed as Exhibit 2 to the affidavit of B. J. Anderson below. In essence, ALPA proposed a minimum pilot crew on jet aircraft of three pilot-qualified persons (R. 82-83). Negotiations between ALPA and Continental followed, at which Continental took the position that it intended to implement the recommendations of the Eastern Air Lines Presidential Emergency Board (R. 83). Thus, it requested that ALPA prepare a cross-seniority proposal, designed to protect the job and seniority rights of the flight engineers, and offering them the opportunity to qualify for the job of (pilot qualified) second officer on the jet. It was intended that flight engineers should have seniority under both the ALPA and FEIA agreements at the same time. This corresponds to a specific recommendation of the Eastern Presidential Emergency Board, which, in its Report to the President, stated:

> "* * * under the program we recommend, the jobs for flight engineers will not be restricted to piston and turboprop airplanes. For those who can and are willing to do so, we propose that sufficient pilot training be offered at the carrier's expense to qualify them for jobs on any aircraft, including the turbojets. * * *
>
> "A flight engineer taking such pilot training will presumably do so on his own time, although at company expense. If he elects to serve as a copilot thereafter, * * * his seniority on the flight engineer list should continue to accrue for a period of time sufficient to enable him to be assured that he has not lost his job protection in the event he becomes subject to furlough as a junior copilot. * * *
>
> "This will make it necessary that appropriate and coordinated seniority provisions be added to the collective bargaining agreements of both FEIA and ALPA. * * *

> "Under such a program those who have been fearful and suspicious can be completely disabused. The purpose will be primarily to conduct the operation of turbojet aircraft on the most cautious and safe basis, in the paramount interest of the public. At the same time, all the legitimate job equities and interests of incumbent employees will be satisfactorily protected" (Report to the President by Emergency Board No. 120, pp. 23-25 (1958); Report to the President by Emergency Board No. 121, pp. 21-23 (1958)).

ALPA prepared a cross-seniority proposal of the type recommended by the Eastern Board. Agreement of Continental, CAL Chapter and ALPA to such a proposal was contemplated (R. 83). The cross-seniority proposal was submitted to Continental in December, 1958, and that carrier delivered this proposed agreement to CAL Chapter for its consideration (R. 84). There followed in April and May, 1959, a number of joint meetings between ALPA and CAL Chapter representatives, at which the cross-seniority arrangement was discussed in great detail and a merger of ALPA and CAL Chapter, proposed by the latter, was taken under consideration (R. 84-85). The proposed cross-seniority agreement was, at these meetings, reduced to final form acceptable to all the representatives, but the meetings were recessed to permit execution by CAL Chapter of a finalized agreement. A final meeting between ALPA and CAL Chapter representatives, at which the executed agreements providing for cross-seniority with full protection for existing job rights were to be exchanged, was scheduled for May 18, 1959 (R. 85). Thereafter, CAL Chapter informed Continental that it would neither agree to the cross-seniority proposal nor hold further discussions with regard thereto (R. 85).

Unable to secure the agreement of CAL Chapter to a proposal which would permit Continental to operate its

turbojet equipment under conditions recommended by the Eastern Board while at the same time preserving "all the legitimate job equities and interest of incumbent employees," Continental and ALPA resumed negotiations and, on May 29, 1959, concluded the agreement challenged in this action (R. 85). This agreement provided for a *minimum* crew of three pilot-qualified crew members, including a second officer, on jet aircraft, but the implementation of this second officer provision was deferred until April 1, 1960, to permit sufficient time for Continental and CAL Chapter to resolve the place, function and qualification of the flight engineer on Continental's jet equipment (R. 85-86).

Following the execution of its agreement on May 29, 1959, with ALPA, Continental offered to eight flight engineers who possessed pilot qualifications the opportunity to secure a position on the pilots' seniority list (R. 86, 111). This was done by placing their names on that list, and requiring them to affirmatively signify their desire to remain on that list, if they wished to do so. This offer in no way affected CAL Chapter, the membership in that chapter of the flight engineers involved, their positions on the flight engineer seniority list, or their coverage under the CAL Chapter agreement with Continental. It was the position of Continental that the cross-seniority of those flight engineers who possessed pilot qualifications "not only added to their usefulness to the Company but added to their own job security and gave them wider choice as to positions in flight deck crews" (R. 111-112). In addition, Continental contemplated the hiring of additional pilots shortly thereafter and it wished first to extend job opportunities to those already in its employ (R. 86). All but one of these individuals subsequently requested that their names be removed from the pilots' seniority list, however, and each such request was respected by Continental (R. 112).

In September, 1959, pursuant to the 1958 CAL Chapter-Continental agreement and to Section 6 of the Railway Labor Act, Continental served on CAL Chapter a notice of proposed changes in the 1958 agreement. In this notice, Continental stated its proposal to operate jet aircraft with a three-pilot crew upon the expiration of the 1958 agreement with CAL Chapter or when agreement with CAL Chapter was reached (R. 96). Mediation followed after an impasse had been reached, and both CAL Chapter and Continental declined the National Mediation Board's proffer of arbitration on the issue (R. 96). In April, 1960, CAL Chapter, still unable to reach agreement with Continental on the question of crew complement on jet equipment, announced its intention to strike on May 1, 1960.

Continental commenced an action in the United States District Court seeking an injunction to prevent the strike, as well as damages (R. 311-322). By judgment dated May 18, 1960, Judge Yankwich denied Continental's motion for a preliminary injunction and dismissed the complaint in the action (R. 475). As the basis for its decision, that Court concluded that the action grew out of a labor dispute as defined in the Norris-LaGuardia Act, thus depriving the Court of jurisdiction to issue an injunction, that all of the procedures and waiting periods under the Railway Labor Act had been exhausted and that "the parties to the labor dispute are no longer bound to observe any further waiting period before resorting to economic action" (R. 471-473).

Thereafter, CAL Chapter announced a new strike deadline of May 22, 1960. ALPA thereupon advised Continental of its intention to respect the CAL Chapter picket lines (R. 88). On May 21, 1960, Continental applied *ex parte* to the Federal Court in Denver for a restraining order against such action by ALPA, which order was granted (R. 88). CAL Chapter's strike was thereafter postponed indefinitely.

On May 29, 1960, a full year after the execution of the ALPA-Continental agreement challenged herein, Continental put into effect the second officer provisions of that agreement (R. 109, 114). CAL Chapter instituted this action on June 1, 1960, alleging a conspiracy between ALPA and Continental (R. 3-15).

All carriers now operating turbojet equipment in domestic air carrier operations do so with a crew which includes three pilot-qualified crew members. In some cases, these three pilots constitute the total crew on the jet; in others, a fourth—a flight engineer who is not qualified as a pilot—is carried (R. 207).

The facts recited above make it clear that what was involved in the instant case was a contract between Continental and ALPA providing for the crewing and training of pilot members of the flight deck crew on turbojet aircraft that was directly in line with an established contractual pattern in the air transport industry for dealing with this matter. This contract did not prevent CAL Chapter from representing its members. Indeed, several alternatives were left open to CAL Chapter. It could proceed as had the FEIA Chapters on Eastern, American, Pan American and TWA to negotiate a position on jet equipment for a non-pilot-qualified flight engineer, a fourth flight deck crew member. It should be noted that the May 29, 1959 agreement between Continental and ALPA provided only for a *minimum* crew. Or CAL Chapter could accept pilot qualifications for its members and by providing for cross seniority and prior rights of its members to the third seat on turbojet aircraft continue to represent the third crew member on that equipment. Another alternative, which CAL Chapter rejected after an agreement had been reduced to final form, was for the CAL Chapter members to accept pilot qualifications and merge with ALPA. See page 13-14, *supra*.

The events which followed the May 29, 1959 agreement between Continental and ALPA reflect CAL Chapter's

efforts to bargain for the alternative of a position for a non-pilot qualified flight engineer on turbojet equipment and Continental's unwillingness to make such an agreement. CAL Chapter did not lack an opportunity to bargain for the employees it represented to secure this objective, but it was unable to secure Continental's agreement to the establishment of a four man turbojet flight deck crew in its operations. This should be contrasted with the success of various FEIA chapters in securing such an agreement on the group of carriers of which Eastern is typical.

It was in the light of this factual background that, after more than three months of a strike by CAL Chapter against Continental, the strikers authorized ALPA to represent them in negotiating a settlement of the strike and took the actions, set forth in the opinion of the Court of Appeals and the record below, dissolving CAL Chapter and settling the dispute with Continental that gave rise to this suit by CAL Chapter. It was on the basis of these record facts that the Court below held the appeal and the action by CAL Chapter moot.

Argument

The Questions Presented on page 2 of the petition for a writ of certiorari are fabricated questions that have no basis in the record or in the decision of the Court of Appeals. The actual question presented by the record and the decision below is a narrow one of mootness of an appeal from an order denying a motion for a preliminary injunction and of the underlying action, resulting in a failure of jurisdiction because of the non-existence of a "case or controversy". This question the Court of Appeals decided in a reasoned opinion that is in full accord with the recent decision of this Court in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union* v. *Missouri*, 361 U. S. 363 (1960).

The instant case involves no conflict of decision and does not raise any question of importance that requires

determination by this Court. Indeed, petitioner concedes one of the basic grounds upon which the Court below found that this case is moot.

It is clear that the decision of the Court below was based on well-established principles of law and that there is no basis for further review by this Court.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL J. COHEN,
Attorney for Respondent, Air Line Pilots Association, International.

Of Counsel:

HENRY WEISS,
BENJAMIN M. SHIEBER.